Nos. 14208, 14218
Consolidated

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WARREN E. TALCOTT, JR.,

Appellant,

vs.

COMMANDING OFFICER, *et al.,*

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,
MANLEY J. BOWLER,
Chief Assistant United States Attorney,
MAX F. DEUTZ,
Assistant United States Attorney,
Chief of Civil Division,
ARLINE MARTIN,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellees.

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PAUL P. O'BRIEN
CLERK

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APPELLEE'S BRIEF.

Jurisdiction.

The District Court has jurisdiction of the two successive Petitions for Writs of Habeas Corpus (Nos. 15813 and 15880 in the District Court, consolidated on appeal) [Tr. 3, 87], under provisions of Title 28, U. S. C., Section 2241 *et seq.*

This Court has jurisdiction of this consolidated appeal under the provisions of Title 28, U. S. C. 2253, the District Court having made and entered its Findings of Fact and Conclusions of Law in action No. 15813 [Tr. 19] and entered its Judgment denying a Petition for Writ of Habeas Corpus and dissolving Temporary Restraining Order on September 25, 1953 [Tr. 23], and

having made and entered its Judgment denying Petition for Writ of Habeas Corpus and disolving Temporary Restraining Order in action No. 15880 on October 29, 1953 [Tr. 109].

Statutes Involved.

Section 456(h) of the Selective Service Act of 1948 as amended June 19, 1951, now called Universal Military Training and Service Act (62 Stat. 604; 50 U. S. C. Appendix 451 *et seq.*), provides in part as follows:

> "*Section 456 Deferments and Exemptions From Training and Service.*
>
> (h) * * * The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the armed forces or from training in the National Security Training Corps (2) * * * of any or all categories of those persons found to be physically, mentally, or morally deficient or defective. * * *"

Said Section 456(h) also provides as follows:

> "* * * provided further, that *persons who are or may be deferred under the provisions of this section shall remain liable for training and service* in the armed forces or for training in the National Security Training Corps under the provisions of Section 4(a) of this Act (Section 454(a) of this Appendix) *until the thirty-fifth anniversary of the date of their birth.* This proviso shall not be construed to prevent the continued deferment of such persons if otherwise deferrable under any other provisions of this Act. * * *" (Emphasis supplied.)

Said Section 456(h) also provides as follows:

> "* * * The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the armed forces or from training in the National Security Training Corps (1) of any or all categories of persons in a status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable, * * *"

The Selective Service Rules and Regulations, issued by the President, pursuant to the Selective Service Act as amended, are contained in Title 32, Code of Federal Regulations (Rev. 1951), Chapter 16, Sections 1602 *et seq.* Sections 1623.1 and 1623.2 of the Selective Service Regulations, provide in part as follows:

> "*Section 1623.1 Commencement of Classification.*
>
> (a) Each registrant shall be classified as soon as practicable after his classification questionnaire (SSS Form No. 100) is received by the Local Board or as soon as practicable after the time allowed for him to return his classification questionnaire (SSS Form No. 100) has expired.
>
> *Section 1623.2 Consideration of Classes.*
>
> Every registrant shall be placed in Class 1-A under the provisions of Section 1622.10 of this Chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class 1-A-O considered the highest class and Class 1-C considered the lowest class according to the following table:"

* * * * * * * *

Section 1622.1 of the Selective Service Regulations provides in part as follows:

> "*Section 1622.1 General Principles of Classification.*
>
> (a) The Universal Military Training and Service Act as amended, provides that every male citizen of the United States, every other male person admitted to the United States for permanent residence, and every other male person who has remained in the United States in a status other than that of permanent resident for a period exceeding one year, who is between the ages of eighteen years and six months and twenty-six years, shall be liable for training and service in the armed forces of the United States, and that persons who on June 19, 1951, were or thereafter are, deferred under the provisions of Section 6 of such Act shall remain liable for training and service until they attain the age of thirty-five. * * *
>
> * * * * * * * *
>
> (c) It is the Local Board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility or deferment or exemption from military service is clearly established to the satisfaction of the Local Board. * * *"

Section 1622.30(c)(2), prior to December 19, 1952, read in part as follows:

> "No registrant shall be placed in Class III-A because he has a child which is not yet born unless, prior to the time the Local Board mails him an order to report for induction, there is filed with the Local Board the Certificate of a licensed physician stating that the child has been conceived. * * *"

Section 1622.30(c)(2) as amended December 19, 1952, reads as follows:

> "No registrant shall be placed in Class III-A because he has a child which is not yet born unless, prior to the time the Local Board mails him an order to report for induction, there is filed with the Local Board the Certificate of a licensed physician stating that the child has been conceived, the probable date of its delivery, and the evidence upon which his positive diagnosis of pregnancy is based."

Section 1622.10, Class I-A: Available for Military Service, reads in part as follows:

> "In Class I-A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to appeal hereinafter provided, that he is eligible for classification in another class."

Section 1625.1 and 2 reads in part as follows:

> "*1625.1 Classification Not Permanent.*
>
> (a) No classification is permanent.
>
> * * * * * * * *
>
> (c) The local Board shall keep informed of the status of classification registrants * * *"
>
> "*1625.2 When Registrant's Classification May Be Reopened and Considered Anew.*
>
> The Local Board may reopen and consider anew the classification of a registrant * * * provided, in either event, *the classification of a registrant shall not be reopened after the Local Board has mailed to such registrant an order to report for induction* (SSS Form 252) unless the Local Board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." (Emphasis supplied.)

Section 1632.2(d) reads in part as follows:

> "*Section 1632.2 Postponement of Induction* * * *
>
> (d) A postponement of induction shall not render invalid the order to report for induction (SSS Form 252) which has been issued to registrant but shall operate only to postpone the reporting date and the registrant shall report on the new date without having issued to him a new order to report for induction (SSS Form 252)."

SSS Form 264, the notice of "Postponement of Induction" contains the following:

> "It is your continuous duty to report for induction upon the termination of this postponement and to report at such time and place as is fixed hereinabove or may hereafter be fixed by this Local Board."

Section 1622.60 of the Selective Service Regulations reads as follows:

> "*Section 1622.60 Director May Direct that Eligibility for Particular Classification be Disregarded.*
>
> The Director of Selective Service notwithstanding any other provisions of the regulations in this Chapter, may direct that any registrant shall be classified or re-classified without regard to his eligibility for a particular classification."

Section 1624.1 of the Rules and Regulations provides as follows:

> "*Section 1624.1 Opportunity to Appear in Person.*
> (a) Every registrant, after his classification is determined by the Local Board * * * shall have an opportunity to appear in person before the member or members of the Local Board designated for the purpose *if he files a written request therefor with-*

in ten days after the Local Board has mailed a notice of classification (SSS Form 110) to him. Such ten day period may not be extended." (Emphasis supplied.)

Section 1626.2 reads in part as follows:

"*1626.2 Appeal by Registrant and Others.*

(a) The registrant, * * * may appeal to an appeal board from any classification of a registrant by the local board except that no person may appeal from the determination of the registrant's physical or mental condition.

* * * * * * * *

(c) The registrant * * * may take an appeal authorized under paragraph (a) of this Section at any time within the following periods:

(1) Within 10 days after the date the local board mails to the registrant a Notice of Classification (SSS Form No. 110)."

"1622.30(d) In the consideration of a dependency claim, any payments of allowance which are payable by the United States to the dependent of persons serving in the armed forces of the United States, shall be taken into consideration * * *"

"*1632.2 Postponement of Induction; General.*

(a) * * * the Director of Selective Service or any State Director * * * may, for good cause, at any time after the issuance of an Order to Report for Induction (SSS Form No. 252) postpone the induction of a registrant until such time as he may deem advisable * * *"

Statement of the Case.

There is one question in this case which was presented to the District Court in the oral argument [Tr. 74] of the first of the two habeas corpus cases consolidated on this appeal, and it is still the principal question to be decided in this appeal.

That question is whether or not appellant, who was originally classified 4-F, which classification he accepted without appeal, can, long after, when he is reclassified 1-A and ordered to report for induction, go back and object to that original 4-F classification.

Because of the fact that appellant was in a deferred classification his liability for service was extended from age 26 to age 35, pursuant to the provisions of Section 6(h) of the Universal Military Training and Service Act, as amended in 1951.

The second question is whether or not, after being ordered to report for induction, the postponement of the date of induction constituted a reopening of the classification of petitioner. If, the postponement of the date of induction did *not* constitute a reopening, then appellant's claims for deferment because of dependency, and a pregnant wife, were presented too late.

There is the third question, present in all habeas corpus Selective Service cases, whether or not the Selective Service file shows a *basis in fact* for the classification given to appellant by the Board, and upon which the induction was based.

It is the Government's position that there was a basis in fact in the Selective Service file for the 4-F classification which was given to appellant, and that there was a basis in fact for the 1-A classification which was subsequently given to appellant.

There is one correction which should be noted in appellant's brief, under "Statement of the Case" (App. Br. p. 2) it is said that it was "stipulated * * * that the matter was to be heard as if a Writ had been issued [Tr. 29]." The Transcript of Record does not support this statement, and the judgment of the Court denied the Petition for the Writ, which never issued.

Summary of Argument.

I.

APPELLANT, HAVING FAILED TO APPEAL HIS CLASSIFICATION AS 4-F, WHICH EXTENDED HIS LIABILITY FOR SERVICE FROM AGE 26 TO AGE 35, CANNOT NOW GO BACK AND OBJECT TO THAT ORIGINAL 4-F CLASSIFICATION, AFTER HE HAS SUBSEQUENTLY BEEN CLASSIFIED 1-A AND INDUCTED INTO THE ARMED FORCES.

A. THERE WAS A BASIS IN FACT IN THE SELECTIVE SERVICE FILE FOR THE 4-F CLASSIFICATION GIVEN APPELLANT ON JANUARY 23, 1950, AND FOR THE SUBSEQUENT 1-A CLASSIFICATION GIVEN APPELLANT ON OCTOBER 7, 1952, AFTER APPELLANT WAS 26 YEARS OF AGE.

B. IT WAS NOT ERROR FOR THE COURT TO EXCLUDE EVIDENCE AS TO WHETHER THE BOARD CONSIDERED THE FILE, THERE BEING A BASIS-IN-FACT IN THE FILE FOR THE CLASSIFICATION GIVEN APPELLANT.

II.

NOTICE OF POSTPONEMENT OF THE DATE FOR INDUCTION OF APPELLANT DID NOT OPERATE TO REOPEN HIS CLASSIFICATION.

A. THE CLAIM OF PREGNANT WIFE WAS MADE AFTER THE ORDER TO REPORT FOR INDUCTION AND WAS THEREFORE TOO LATE, AND IS NOT SUCH A CHANGE IN THE REGISTRANT'S STATUS AS TO REQUIRE THE BOARD TO REOPEN HIS CLASSIFICATION.

B. THE LOCAL BOARD HAD NO RIGHT, PURSUANT TO SECTION 1622.30(c)(2), TO REOPEN THE CLASSIFICATION OF APPELLANT AFTER THE ORDER TO REPORT FOR INDUCTION; SECTION 1625.2, AND THE CASES CONSTRUING IT, ARE INAPPLICABLE WHERE A CLAIM FOR A III-A CLASSIFICATION IS FILED TOO LATE.

III.

APPELLANT DID NOT REQUEST A PERSONAL APPEARANCE BEFORE THE BOARD AND THERE WAS NO DENIAL OF DUE PROCESS.

ARGUMENT.

I.

Appellant, Having Failed to Appeal His Classification as 4-F, Which Extended His Liability for Service From Age 26 to 35 Years, Cannot Now Go Back and Object to That Original 4-F Classification, After He Was Subsequently Classified 1-A and Inducted Into the Armed Forces.

A. There Was a Basis in Fact in the Selective Service File for the 4-F Classification Given Appellant on January 23, 1950, and for the Subsequent 1-A Classification Given Appellant on October 7, 1952, After Appellant Was 26 Years of Age.

A photostatic copy of the Selective Service File of appellant was introduced in evidence as Exhibit 1 of respondent (appellee here). The pages of the file have been numbered in handwriting and the numbers circled, at the bottom of each page. The classification questionnaire submitted by appellant is contained at pages 2 to 10, and page 11, being the last page thereof, is the place where the entries of Minutes of Action by the Local Board and Appeal Board are made.

The facts, as shown by the Selective Service file, are that petitioner was born on October 2, 1925, and at the age of 23, on January 23, 1950, was classified 4-F, a deferred classification. Petitioner accepted said classification, made no appeal therefrom, and was therefore not called for service. On June 19, 1951, liability for service was extended for *deferred classifications* from age 26 to age 35 (Universal Military Training and Service Act

of 1951, 50 Appendix U. S. C. 456(h)), and appellant's liability for service was thereby extended to age 35.

Section 1641.2(b) provides:

> "1641.2 *Failure to Take Notice.*
>
> (b) If a registrant * * * fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege."

Over a year later, on October 7, 1952, the Local Board reviewed appellant's file and classified him 1-A, and on November 25, 1952, sent him an order to report for induction on December 10, 1952. In the meantime appellant had appealed the 1-A classification and it was upheld by the Appeal Board. On November 29, 1952, the Board postponed the induction of appellant, but did not reopen the file for classification, and the petitioner was, on August 21, 1953, duly and regularly inducted into the Armed Forces of the United States. These facts are contained in the findings of the District Court in the first habeas corpus action [Tr. 20, 21].

In addition, the court concluded as a matter of law that there was evidence before the Local Board to support its classification of petitioner as 4-F and to support the classification later on as 1-A; that the classification of 1-A was made in conformity with Selective Service Regulations and the Universal Military Training and Service Act; that there was due process and the action was not arbitrary nor capricious [Tr. 22].

A chronology of the action taken is as follows:

Date	Action Taken [Ex. 1, p. 11]
October 2, 1925	Appellant born.
January 23, 1950	Appellant classified 4-F.
January 31, 1950	SSS Form 110 mailed to appellant, notifies him of 4-F classification and advises him he may appeal from that classification by filing a written notice within 10 days, or request a personal appearance. Appellant does not appeal.
June 19, 1951	Universal Military Training and Service Act in Section 6(h) extends liability for service to age 35 from age 26. Appellant is still 25 years of age.
October 2, 1951	Appellant is 26 years of age, but still liable for service because still classified 4-F, a deferred classification.
April 7, 1952	Form 223 mailed, orders appellant to report for physical examination.
September 30, 1952	Form 62 the "Determination" of physical condition [Ex. 1, p. 23], mailed to appellant, is notice of acceptability by the Armed Forces.
October 7, 1952	Appellant classified 1-A by vote of 2 members of Local Board, and mailed SSS Form 110 [Ex. 1, p. 11].
October 16, 1952	Letter of appeal received from appellant [Ex. 1, pp. 25-28].
October 22, 1952	Reviewed by Local Board, no change.
October 22, 1952	Form C-140 mailed to appellant, is notice to him of Local Board's review and its decision that the infor-

Date	Action Taken
	mation submitted does not warrant reopening of registrant's classification. Appellant's file forwarded to Appeal Board on same date.
November 24, 1952	Appellant's file returned from Appeal Board, classified 1-A.
November 25, 1952	SSS Form 110 mailed to appellant and Form 252 mailed, ordering appellant to report for induction on December 10, 1952 [Ex. 1, p. 30].
November 29, 1952	Form 264 issued [Ex. 1, p. 43], induction postponed pending investigation of dependency. Notice reads, "It is your continuous duty to report for induction upon the termination of this postponement and to report at such time and place as is fixed hereinabove or may hereafter be fixed by this local Board."
December 19, 1952	Local Board requests investigation [Ex. 1, p. 41] in N. Y.
May 11, 1953	Report of Investigation by N. Y. [Ex. 1, pp. 56-60].
June 24, 1953	Letter and file forwarded to State Headquarters.
July 2, 1953	File returned with letter from State Headquarters.
August 5, 1953	Form C-190 issued, directing appellant to report for induction on August 21, 1953.
August 21, 1953	Appellant duly and regularly inducted into the Armed Forces of the United States.

The argument is made in Points I, C and D of appellant's brief, and in Point II of appellant's brief (App. Br. pp. 18-28), that "no appeal was permitted" from the 4-F classification and that the classification was invalid.

Appellant has failed to distinguish the phrases "classification" and "determination" as used in Section 1626.2 (a) of the Regulations (see Statutes Involved), which reads: "The Registrant * * * may appeal to an Appeal Board from any *classification,*" and "no such person may appeal from the *determination* of the registrant's physical or mental condition" (emphasis supplied). It is clear from said section that appellant could have appealed from the classification of 4-F on January 23, 1950, but that after a physical examination by the Army and a "determination," by the Army of appellant's physical condition, there was no appeal.

It will be noted in the above chronology that there was no physical examination of appellant at the time of his classification of 4-F, and therefore no "*determination* of the registrant's physical or mental condition." The Form SSS 110 which was mailed to the petitioner after his classification of 4-F, on January 31, 1950, contains the provisions "you may appeal from this classification by filing written notice within 10 days," and said form further advises appellant of his rights to a personal appearance and other rights. In other words, "4-F" is an appealable "classification" not a non-appealable "determination of physical condition."

On April 7, 1952, Form 223 ordered appellant to report for a physical examination, and thereafter, on September 30, 1952, Form 62 mailed to him advised that he was acceptable. That Form 62 [Ex. 1, p. 23] is the "deter-

mination of the registrant's physical condition," from which there is no appeal.

The fact is, appellant received a 4-F classification which he was happy to accept, being thereby deferred from service in the Armed Forces. There was every possibility that he would reach the age of 26, on October 2, 1951, without being drafted, and his eligibility for service would expire. By not appealing the 4-F classification, appellant took the chance that the liability for service might be extended beyond the 26 years, and he lost, because liability for service was extended to age 35 before he reached the age 26. But it was a chance he took, and having elected not to appeal the 4-F classification, after notice it was appealable, he cannot now complain. See *Olinger v. Partridge,* 106 F. 2d 986, where this Court said at page 987: "Olinger's inaction . . . amounts to a waiver of any rights which he may have claimed . . ."

The case of *United States v. Shaw,* 118 F. S. 849, cited by appellant (App. Br. p. 23), is not analogous. In the *Shaw* case, the registrant was born December 5, 1924, and on January 8, 1951 (after registrant was 26 years of age and prior to the June 19, 1951 amendment to the Act extending liability for service from 26 to 35 for deferred classification) he was ordered to report for Induction. He was *not* in a deferred classification at that time, and was making no claim for a deferred classification. The Court properly set aside Shaw's plea of guilty to an indictment for refusing induction.

See also this Court's decision in *Sisquoc Ranch Co. v. Roth,* 153 F. 2d 439 (1946), where a II-A deferred classification was later, with nothing new, changed to a I-A, and the reclassification was sustained and the denial

of the Petition by the District Court was affirmed on appeal.

See also *Tyrrell v. United States,* 200 F. 2d 8, where a IV-D was reclassified I-A, and the Court, in affirming a judgment of conviction, said at pages 11 and 12:

> "The duty of local draft boards to classify and reclassify registrants * * * is one of continual recurrence * * *
>
> * * * * * * * *
>
> It is to be presumed that the board discharged this duty * * * and consequently the court properly charged the jury that there existed a basis in fact for the classification of August 28, 1950."

Furthermore, the 4-F classification was valid because there was a "basis in fact" in the file for such classification, which is all that is required to sustain a classification of the Board by the *Cox* and *Dickinson* cases. *Cox v. United States,* 332 U. S. 442 at page 453; and *Dickinson v. United States,* 346 U. S. 389, 74 S. Ct. 153.

The basis in fact in the file for the 4F classification is contained in the Selective Service classification questionnaire [Ex. 1, p. 10] where, under the heading "Physical Condition," is the question (1) "Do you have any physical or mental condition which, in your opinion, will disqualify you from service in the Armed Forces?" and a place for answer Yes or No. Appellant marked the answer "No."

In answer to Question (2), "If the answer to Question (1) is 'yes,' state the condition from which you are suffering," appellant stated as follows:

> "I was discharged from Naval Reserve Training Corp. because of a punctured eardrum—later examination show no such condition."

Later, on the same page of the classification questionnaire, under the heading "Registrant's Statement Regarding Classification" where it says "The registrant may write in the space below or attach to this page any statement which he believes should be brought to the attention of the local Board in determining this classification," appellant had written:

> "As stated in Series 15, I feel that the condition of my eardrum should be clearly established."

Under State Director's Advice No. 55, issued by General Hershey, local boards were authorized to place in classification 4-F any registrant who had theretofore been rejected for service by the Armed Forces. It was not incumbent on the Board at that time to require a physical examination of appellant, and upon the showing made in the classification questionnaire there was a basis in fact for the 4-F classification, and it was therefore valid. Page 11 of Exhibit 1 indicates the minutes of action by the Local Board and shows as follows: On January 23, 1950, the vote of the Board members was two in favor of the 4-F classification.

In this state of the record, and in the absence of any appeal or request for personal appearance or other action by the appellant, after receiving notice in the Form 110 of his rights to make such request, there can be no question but the 4-F classification was valid.

B. It Was Not Error for the Court to Exclude Evidence as to Whether the Board Considered the File There Being a Basis-in-Fact in the File for the Classification Given Appellant.

Furthermore, evidence as to whether or not the individual members of the draft board actually considered the file, as offered by appellant at the hearing on the second writ of habeas corpus, is immaterial. The District Court did not err in excluding such evidence because, since the file actually supports the classification of 4-F, such evidence would be immaterial. Appellant would not have sustained his offer of proof, as appellee was in possession of evidence to the contrary but objection was made, because if every classification could be attacked by an attempted showing that at a time several years past, when some classification was made, the Board members did not actually consider the file, there would never be an end to litigation in Selective Service cases. Clearly, if it is error at all, it is not prejudical error to exclude such evidence, where the file itself contains a basis-in-fact for the classification, and appellant should not be allowed to go so far afield. The presumption of regularity of the acts of the Draft Board officials is in this instance buttressed by the Selective Service file itself, which indicates [Ex. 1, p. 10, *supra*] that two Board members actually voted for the 4-F classification.

Appellant claims (App. Br. p. 14) that the Local Board was "early won over to the registrant's viewpoint" and so expressed itself in the June 24, 1953, letter to the State

Director [Ex. 1, pp. 63-64]. A careful reading of that letter reveals only that the Local Board recognized the legal point involved in the question of extension of liability for service, and wished the Appeal Board to pass on it. The Local Board said in that letter:

> "after careful review of the evidence, this Local Board feels that this might well be the case, and would hesitate to enforce an order for induction, in error. Therefore we are requesting a review of his questionnaire and the letter of October 14, 1952, submitted by the registrant in support of his appeal * * *"

The *Cox* and *Dickinson* cases, *supra,* clearly settled that it is not a question of what is in the minds of the Board members, but rather it is a question "What is in the file?" "Is there a basis in fact in the file for the classification?" The court clearly did not err in excluding evidence regarding the sympathies of the Board members.

Further, there was basis in fact in the file for the subsequent 1-A classification given appellant on October 2, 1952. It is clear from the Regulations that it is the continuing duty of the boards to "keep informed of the status of classification registrants," and that no classification is permanent (Sec. 1625.1(a) and (c), *supra*). It is not disputed that the Board may at any time review a classification given.

On or about April 7, 1952, the Board mailed appellant Form 223, an order to report for physical examination. He did so report. Page 23 of Exhibit 1 is the "Certificate of Acceptability," dated September 12, 1952, after the Army had made a physical examination of appellant, and that is the "determination" of physical condition men-

tioned in Section 1626.2 of the Regulations. The Army had checked the findings "found fully acceptable for induction into the Armed Services." Page 23, then, is the new evidence in appellant's file which is the "basis of fact" for the change in classification to 1-A by the Local Board on October 7, 1952, subsequently affirmed after an appeal to the Appeal Board.

We cannot agree with appellant's analysis that the Board is required by the *Dickinson* case, *supra,* to "build a record" in this case (App. Br. pp. 27-28). Taken out of context and applied to other types of cases, the language of the *Dickinson* case is misleading.

Dickinson claimed exemption as a conscientious objector, and there was no evidence in the file to controvert this claim. The court said, at page 397:

> "But when the uncontroverted evidence supporting a registrant's claim placed him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."

The distinction in the present case is evident. The evidence in the file does *not* place appellant *prima facie* in a III-A classification, and a review of the facts in the file sustain the view that it was *not* an abuse of discretion to classify appellant 1-A. In other words, it cannot be said that the facts in appellant's file *prima facie* entitle him to a III-A classification. Reasonable men might disagree, but it was not an abuse of discretion to classify appellant IV-F, or subsequently to classify him 1-A because there was at the time of each classification a "basis-in-fact" to support such classification. Classifications

such as III-A and IV-F are deferred classifications pursuant to regulation in the discretion of the Board, whereas the IV-D classification in the *Dickinson* case is an exemption by statute, merely requiring a factual determination by the Board of whether the registrant is or is not a minister, and does not involve the exercise of discretion. Appellant cites the case of *United States v. Sage,* 118 Fed. Supp. 33, in support of his argument (App. Br. p. 17) that he should be allowed to offer evidence as to whether or not the Board considered the file, without regard to whether or not the file shows a basis-in-fact for the classification. The quotation in appellant's brief from the *Sage* case does not correctly represent the court's decision as we read that case. There is no holding by the court that a defect in procedure had to be cured, resulting from the fact that an unauthorized person had seconded a motion made in connection with defendant's classification by the Board. No such question was raised in the case. The statement is made in connection with a recital of the action taken by the Appeal Board, which at one stage of the proceedings had returned to the Local Board the file "because it was incomplete and because an unauthorized person had seconded a motion made in connection with the defendant's classification by the local." The Local Board had reopened the case and cured the defect, and the *Sage* case does not hold that it is reversible error because that question was not before it. The case is really analogous to the *Dickinson* case, in holding that there was no basis-in-fact for the

classification of the defendant as 1-A, and no evidence upon which the court could deny the exemption as a minister.

Appellant cites the case of *United States ex rel. Accardi v. Shaughnessy*, 347 U. S. 260, in support of statements that the "classification must be done by the Board" and that the "evidence in the file must be considered before classification." The *Accardi* case is one where it was alleged in a habeas corpus petition that the denial of the petitioner's application for suspension of deportation by the Board of Immigration Appeals, was "prejudged by the issuance by the Attorney General in 1952, prior to the Board's decision, of a confidential list of 'unsavory characters' including this petitioner's name, which made it impossible for him to secure fair consideration of his case." The court said, at page 268:

> "After the recall or cancellation of the list, the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right."

What the court is objecting to in the *Accardi* case is that the Board went *outside* the record and considered something not in the record in arriving at a discretionary decision not in favor of appellant. The factual situation is too far removed from the present case, for the *Accardi* case to be helpful.

II.

Notice of Postponement of the Order for Induction of Appellant Did Not Operate to Reopen His Classification.

A. The Claim of Pregnant Wife Was Made After the Order to Report for Induction and It Was Therefore Too Late, and Is Not Such a Change in the Status as to Require the Board to Reopen Registrant's Classification.

Point IV of appellant's brief claims a denial of due process for failure to reopen appellant's classification, after sending him the Order to Report for Induction. There is language in appellant's argument about how the Board "and doubtless the Clerk too," came to have a "sympathetic attitude towards appellant," but that their construction was "too literal" and "harshly bureaucratic construction," and language that where the registrant had presented in his file evidence for various "deferred classifications" that "all of it was ignored." This language is unsupported by fact.

As the file will show [Ex. 1] appellant enjoyed deferment by reason of a IV-F classification from January 23, 1950 to April 7, 1952, when he was ordered to report for a physical examination, and knew from that latter date forward, that he faced the possibility of being classified 1-A and ordered to report for induction. The facts show that after appealing the 1-A classification, which was affirmed, that on November 25, 1952, an Order to Report for Induction was mailed to appellant in New York and after receipt of same, and on December 1, 1952, he forwarded to the Board the statement of the doctor and his letter indicating that his wife was in the second month of pregnancy, which would place conception sometime in early October 1952.

As a result of what appellant terms a "harshly bureaucratic construction," the Board requested a postponement of the induction, and the Coordinator for the Boards granted the postponement for thirty days, and a further investigation ensued. As a matter of actual fact the notice terminating postponement of induction and requiring appellant to report to the Board for induction was not sent until the following year, August 5, 1953, and appellant was not inducted until August 21, 1953. The "bureaucratic" Board (despite the fact that the regulations, Sec. 1622.30(c)(2), provided that no registrant shall be placed in Class III-A because he has a child which is not yet born unless, prior to the time the Local Board mails him an order to report for induction, there is filed with the Local Board the certificate of a licensed physician stating that the child has been conceived), somehow postponed the induction until after the child was born. During the ensuing year the evidence was reviewed and further investigation made.

Clearly under Section 1625.2 of the Regulations the classification could not be reopened until or unless the Local Board first found there had been a change in the registrant's status resulting from "circumstances over which the registrant had no control." The Director of Selective Service, Hershey, had long since advised the local boards (Operations Bulletin No. 57) that pregnancy is a status over which the registrant does have control, and it is therefore not a claim which can be classified under "hardship" such as sickness, death or an extreme emergency beyond the registrant's control.

This would seem to be a case where, to paraphrase a phrase, the Board is "blamed if it does, and blamed if it does not." Appellant would seem to have had every possible chance to avoid induction, by reason of his IV-F

classification, and the subsequent over one-year postponement of induction. That the exigencies of war required that those classified 1-A be inducted into the Armed Services, was a chance which appellant like all other eligible inductees had to take, and over which the Board had no control.

The chronology of the above incident is as follows:

DATE	ACTION TAKEN
Nov. 25, 1952	—Form 252 mailed to appellant, being Order to Report for Induction on December 10, 1952 [Ex. I, p. 30].
Dec. 5, 1952	—[Ex. 1, pp. 31, 32, 33] Letter from appellant in New York mailed after receipt of order to report for induction together with statement of Dr. Kingsley that appellant's wife was in the second month of pregnancy and had been under his care since June 13, 1952 "for difficulties in conception, hormone treatment and observation of the ovulation, finally led to conception."
Dec. 5, 1952	—Board letter to District Coordinator [Ex. 1, p. 35] recommending postponement of induction.
Dec. 16, 1952	—Letter from Board Coordinator granting postponement of induction [Ex. 1, p. 39].
Dec. 29, 1952	—SSS Form 264 issued postponing induction for 30 days contains the following: "It is your continuous duty to report for induction upon termination of this postponement and to report at such time and place as is fixed hereinabove or may hereafter be fixed by this local board."
Aug. 5, 1953	—Form C-190, letter directing registrant to report for induction on August 21, 1953.

The Board letter of December 5, and the Coordinator's letter of December 16, *supra*, are here set forth in full.

"December 5, 1952

Major E. M. Keeley
Coordinator, District No. 5
1206 South Santee Street
Los Angeles, California

Subject: Warren E. Talcott
4-95-25-647

Dear Sir:

On November 26, 1952 our subject named registrant was mailed an order to report for induction on December 10, 1952.

We are now in receipt of information verified by physicians' reports of the extreme illness and dependency of his wife. After careful consideration of this Local Board it is their opinion that this dependency should be investigated further.

Therefore, this Local Board recommends that this induction be postponed for a period of thirty days to allow further investigation of this claim, if the facts as presented warrant, permission to reopen and reclassify.

Yours truly,
Mabel S. Wallace
Group Coordinator."

"Selective Service System
Headquarters, District No. 5
1206 So. Santee Street
Los Angeles 15, California

16 December 1952

Local Board No. 95
Los Angeles County

Dec. 18 1952 (date received stamp)
10821-23 Santa Monica Blvd.

Los Angeles 25, Calif.

Local Board No. 95
10823 Santa Monica Blvd.
Los Angeles 25, California

Subject: Warren E. Talcott
SS No. 4-95-25-647

Gentlemen:

Your local board has requested of me a postponement of the registrant's induction of 10 December 1952. The registrant has requested a transfer for induction, and a physician's letter now verifies that the wife is pregnant and is very ill. You have requested this postponement for the purpose of further investigating the dependency.

It is noted that this registrant remained in a IV-F classification because of an alleged punctured ear drum. Being in a IV-F classification, the registrant's liability was extended. The registrant was ordered to report for physical examination and the punctured ear drum was apparently found to be in error. The file discloses that shortly after the registrant was ordered to report for physical examination, his wife started hormone injection treatments in order to bring on conception. Conception was not successful at the time the registrant was classified I-A, and had

not materialized at the time the registrant took an appeal. According to the doctor's letter, laboratory tests did not show conception until after the registrant had been ordered for induction. The doctor's letter is rather vague as to the wife's illness. The letter sets forth that the registrant's wife is suffering from morning sickness which, I am informed by one of our doctors, is to be expected. It is also noted that the local board of transfer in New York did not return the physical papers for nearly six months. The file discloses that the parents of the wife reside in San Marino, California and no contention is made that they are in financial distress.

Your attention is called to Section 1622-30(c)(2) of Selective Service Regulations and to Operations Bulletin No. 57.

Under the authority vested in me by the State Director of Selective Service for the State of California, the registrant's induction is hereby postponed under the provisions of Section 1632.2 of Selective Service Regulations for a period of thirty days.

For the State Director
/s/ Elias M. Keeley
Elias M. Keeley
Major, AGC
Coordinator—District 5."

We do not understand the argument by appellant at page 23 of his brief that "the postponement was 'for a reason not related to the filing of the certificate.'" Obviously, the postponement indicated in the letter [Ex. 1, p. 39], was made pursuant to Section 1632.2(a) of the Regulations which provide as follows:

"*Section 1632.2 Postponement of Induction; General.* (a) * * * The Director of Selective Service

> or any State Director of Selective Service (as to registrants registered within his State) may, for good cause, *at any time* after the issuance of an order to report for induction (SSS Form 252), postpone the induction of a registrant until such time as he may deem advisable, and no registrant whose induction has been thus postponed shall be inducted into the Armed Forces during the period of any such postponement."

Subsection (d) of Section 1632.2 of the Regulations further povides:

> "(d) A postponement of induction shall *not* render invalid the order to report for induction (SSS Form No. 252) which has been issued to the registrant but shall operate only to postpone the reporting date and the registrant shall report on the new date without having issued to him a new order to report for induction (SSS Form No. 252)."

B. The Local Board Had No Right, Pursuant to Section 1622.30(c)(2), to Reopen the Classification of Appellant After the Order to Report for Induction; Section 1625.2, and the Cases Construing It, Are Inapplicable Where a Claim for a III-A Classification Is Filed Too Late.

We have already pointed out that Section 1625.2 of the Regulations is inapplicable because it only provides for a reopening of a classification where the Board first "specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control," and a claim for III-A classification because of pregnant wife has been held to be a circumstance over which the registrant has control. See *Ex parte Hannig,* 106 Fed. Supp. 715, where the Court said the Board was "powerless to reclassify" unless a change of

status "over which he had no control." Therefore, the cases cited in appellant's brief, pages 36 to 41, construing this section, and involving criminal prosecutions and claims of exemption as conscientious objectors, are inapplicable.

As pointed out, *supra,* Section 1622.30(c)(2) (*supra*), is the special Regulation applicable to the claim of III-A because of pregnant wife and there are no cases cited which hold that it is an abuse of discretion for the Board not to reopen a classification claimed under that section. Nor are there any cases which hold that that portion of the regulation is contrary to the Congressional intent as expressed in the Act.

The case of *United States v. Stalter,* 151 F. 2d 633, cited by appellant, was a case which raised the question whether relator's classification should be determined according to his status at the time of his registration, or at the time of his final classification. There is no question involved in the case about reopening a classification after receipt of an order to report for induction. All the court is holding is that the time of his "final classification" is the time as of which the status should be determined. The portion of the opinion quoted at page 36 of appellant's brief was discussing this situation when the court said, "We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be entitled to a deferment." Appellant failed to finish the quotation of that particular paragraph where the court went on to say ". . . and we see no reason why a registrant claiming to be exempt as a minister should not be classified according to his status at the time of his final classification rather than that at the time of registration."

The case of *United States v. Crawford* (N. D. Cal. Feb. 5, 1954), 119 Fed. Supp. 729, involves a claim of conscientious objection, and also involves Section 1625.2 of the Regulations and, again, is inapplicable to the present situation for the reasons above stated.

The case of *Berman v. Craig,* 207 F. 2d 888, is another case involving Section 1625.2 of the Regulations, and a claim for classification of III-D by reason of registrants' change of status to that of a divinity student.

The case of *United States v. Clark,* 105 Fed. Supp. 613, which involves "exemption" by statute and not a discretionary "deferment," is also inapplicable to the present situation, because they are construing the right to an appeal from the denial of a claim of conscientious objection where the claim for classification as a conscientious objector was made after the order to report for induction. In construing Section 6(j) of the Selective Service Act, the court said, at page 614:

> "The section prescribes a procedure to be followed by the Appeal Board, provides for an inquiry and recommendation after the hearing by the Department of Justice, and gives a right of appeal to 'any person claiming exemption' as a conscientious objector 'if such claim is not sustained by the local board.' This section does not indicate any restriction or limitations on the right of appeal, and we think that under the facts of this case, the defendant was entitled to an appeal from the decision of the local Board refusing to grant his claim for exemption as a conscientious objector."

The *Clark* case is further distinguished by the fact that in the instant case the classification of appellant as 1-A had been appealed and the Appeal Board had sustained the classification. In general, the reasoning and statements of the court in the opinions on "exemptions" in conscientious objector cases in criminal prosecutions are not applicable to claims for "deferment" on other bases in actions in habeas corpus.

III.

Appellant Did Not Request a Personal Appearance Before the Board and There Was No Denial of Due Process.

The facts do not support appellant's claim in Point III of his brief that after receipt of notification of his classification as 1-A on October 7, 1952, appellant requested an opportunity to appear in person before the members of the Local Board, which right he has under Section 1624.1 of the Regulations providing he files a written request therefor within ten days after the Local Board has mailed a notice of classification (SSS Form 110) to him.

Appellant's letter dated October 14, 1952, was properly treated as a notice of appeal, but we think there was no error by the Board in not considering that letter a request for a personal appearance, when it specifically stated, "I would have preferred to appear before you to relate these circumstances more fully. However, the distance and expense presents difficulties. However, after reviewing this appeal, if you feel my appearance would offer

a more complete hearing, I will be glad to appear in person."

This letter [Ex. 1, p. 25] clearly was not a request for a personal appearance before the Board. A personal appearance would necessarily have to be before the Board in California and appellant was in New York.

Thereafter, on October 22, 1952, a Form C-140 was mailed to appellant, notifying him that the information submitted did not warrant the reopening of his classification, and thereafter petitioner's file was forwarded to the Appeal Board for the review requested. The Appeal Board sustained the classification of 1-A, and on November 25, 1952, mailed a Form 110, notice thereof, to appellant. Thereafter, the request for postponement of the induction was made by appellant, and the claim of dependency was raised, and on December 29, 1952, Form 264 was issued postponing the induction. At about that time the Local Board requested an investigation be made in New York [Ex. 1, p. 41] regarding appellant's claim of dependency and hardship.

Thereafter, on May 11, 1953, the report of the investigation made in New York by the Veteran Assistance Welfare Center was received by the Local Board [Ex. 1, pp. 56-60]. That report of investigation indicates that the appellant was interviewed regarding his claim. In other words, although appellant did *not* request a personal appearance, because he did not desire to come to California and appear before the Board, nevertheless, he received

the same result as though he had had a personal appearance, by reason of the investigation by the New York agency. There was no denial of due process.

It is respectfully submitted that the findings and judgment of the District Court should be affirmed.

LAUGHLIN E. WATERS,
United States Attorney,

MANLEY J. BOWLER,
Chief Asst. United States Attorney,

MAX F. DEUTZ,
Asst. United States Attorney, Chief of Civil Division,

ARLINE MARTIN,
Asst. United States Attorney,

Attorneys for Appellee.